BADROL HISHAM OTHMAN v. PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD SHARIFF ABU SAMAH JC
[CRIMINAL APPEAL NO: 42(ORS)(A)-68-07-2015]
14 JANUARY 2016

CONSTITUTIONAL LAW: *Attorney General – Powers and prerogatives – Constitutional powers of Attorney General – Powers to institute, conduct or discontinue proceedings – Whether Public Prosecutor had control and direction of all criminal prosecution and proceedings – Criminal Procedure Code, s. 376 – Federal Constitution, art. 145(3)*

CRIMINAL PROCEDURE: *Acquittal or discharge – Discharge not amounting to acquittal – Appeal – Accused charged with enticing married woman for illicit intercourse – Penal Code, s. 498 – Complainant withdrew police report – Whether withdrawal of police report constituted disinterest in pursuing matter – Whether prosecution could proceed with trial without complainant's evidence – Order of discharge not amounting to acquittal – Whether appropriate – Whether accused ought to be discharged and acquitted – Criminal Procedure Code, s. 254*

The appellant was charged at the Sessions Court with three counts of offences under s. 498 of Penal Code, for enticing a married woman for an illicit intercourse. The woman's husband ('the complainant') lodged a police report against the appellant but later withdrew the same. Arising therefrom, the prosecution sought for the appellant to be discharged not amounting to acquittal ('DNAA') under s. 254 of the Criminal Procedure Code ('CPC'). The appellant contended that he should be discharged and acquitted ('DAA') because (i) the complainant was no longer interested in pursuing the matter; and (ii) without the presence of the complainant's evidence, it was impossible for the prosecution to proceed with the trial against the appellant. In ordering the appellant to be DNAA, the Sessions Court Judge ('SCJ') opined that (i) pursuant to art. 145(3) of the Federal Constitution ('the Constitution'), it is the power of the Attorney General ('AG') as Public Prosecutor ('PP') to institute, conduct or discontinue any proceedings for an offence other than proceedings before the Syariah Court, Native Court or Court Martial; and (ii) pursuant to s. 376 of the CPC, the AG shall be the PP and shall have control and direction of all criminal prosecution and proceedings under the CPC. Hence, the present appeal by the appellant.

Held (dismissing appeal):

(1) Reading art. 145(3) of the Constitution together with s. 376 of the CPC, the AG, being the PP, shall have full control and direction of all criminal prosecution and proceedings under the Code. The SCJs are partners in the machinery of justice and are similarly clothed with the

A relevant power and authority for purposes of carrying out her duties. For the conduct of criminal cases, the SCJ had observed the procedures laid down in the CPC. To pronounce an order of DAA or DNAA which is not in accordance with the requirements of the law would be *ultra vires* the Constitution and the CPC. (paras 10 & 16)

B **(2)** The power to prosecute will always lie with the PP. Although the complainant was not interested in pursuing the trial or proceeding, the court would not usurp the power of the PP and order a DAA against the appellant. When a complainant is no longer interested, the application should be allowed. However, the power to discontinue will always lie C with the PP and not the complainant or others. (paras 11 & 14)

(3) Although the prosecution had informed the Sessions Court of the complainant's wish to withdraw his report, the prosecution did not express its disinterest in pursuing the case. The charge was not groundless. The prosecution had several other witnesses and evidences D to prove the elements of offence under s. 498 of the Penal Code. These evidences and witnesses were yet to be heard. This reflected the prosecution's seriousness to proceed with the trial. (para 18)

Case(s) referred to:

E *Alamgir & Another vs. The State of Bihar 1959 AIR 436, 1959 SCR Supl. (1) 464* ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Datuk (Datu) Amir Kahar Tun Haji Mustapha v. Tun Mohd Said Keruak (Yang Di-Pertua Negeri Sabah) & Ors [1994] 4 CLJ 656 HC ***(refd)***
Koh Teck Chai v. PP [1967] 1 LNS 72 HC ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
F *PP v. Mat Zain [1948] MLJ Supp 142* ***(refd)***
PP v. Suppiah Pather (Penang Criminal Revision No. 14 of 1951) (unreported) ***(refd)***
PP v. Syed Abdul Bahari Shahabuddin [1975] 1 LNS 137 HC ***(refd)***
PP v. Zainuddin & Anor [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Tan Ah Chan v. Regina [1955] 1 LNS 155 HC ***(refd)***

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Legislation referred to:

Criminal Procedure Code, ss. 254, 376
Federal Constitution, art. 145(3)
Penal Code, s. 498

H *For the prosecution - Noor Svetlana Mohd Noor Nordin (Wan Shahida with her); DPP*
For appellant - Muhammad Nor Izzat Nordin; M/s Amar Izzat & Co

Reported by Najib Tamby

I

JUDGMENT

Mohamad Shariff Abu Samah JC:

Background

[1] This is an appeal by the appellant against the decision of the learned Sessions Court Judge who had ordered a discharge not amounting to an acquittal under s. 254 of the Criminal Procedure Code. The decision was delivered and pronounced on 14 July 2015. Hence, the appellant appealed against the said decision and argued that the appellant should be acquitted and discharged. Before I proceed to decide on this matter, let's look at the charges that was preferred against the appellant. The charges are as follows:

First charge:

Bahawa kamu pada 6 Mac 2014 di hotel Leo Express, 59-65, Jalan Sungai Besi, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah pergi memikat Yusrina Binti Mat Zin @ Mohd Zain (Nombor Kad Pengenalan: 720202-07-5402) yang kamu ketahui merupakan isteri kepada Munir Bin Mohamad (Nombor Kad Pengenalan: 671220-02-6043) dengan niat supaya perempuan itu boleh melakukan persetubuhan yang ditegah dengan kamu, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 498 Kanun Keseksaan.

Hukuman

Sabit kesalahan kamu boleh dipenjara selama tempoh yang boleh sampai dua tahun, atau dengan denda, atau dengan kedua-duanya.

Second Charge

Bahawa kamu pada 29 April 2014 di hotel Leo Express, 59-65, Jalan Sungai Besi, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah pergi memikat Yusrina Binti Mat Zin @ Mohd Zain (Nombor Kad Pengenalan: 720202-07-5402) yang kamu ketahui merupakan isteri kepada Munir Bin Mohamad (Nombor Kad Pengenalan: 671220-02-6043) dengan niat supaya perempuan itu boleh melakukan persetubuhan yang ditegah dengan kamu, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 498 Kanun Keseksaan.

Hukuman

Sabit kesalahan kamu boleh dipenjara selama tempoh yang boleh sampai dua tahun, atau dengan denda, atau dengan kedua-duanya.

Third charge:

Bahawa kamu pada 13 Oktober 2014 di hotel Leo Express, 59-65, Jalan Sungai Besi, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah pergi memikat Yusrina Binti Mat Zin @ Mohd Zain (Nombor Kad Pengenalan: 720202-07-5402) yang kamu ketahui merupakan isteri kepada Munir Bin Mohamad (Nombor Kad Pengenalan: 671220-02-6043) dengan niat supaya perempuan itu boleh melakukan persetubuhan yang ditegah dengan kamu, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 498 Kanun Keseksaan.

A Hukuman

Sabit kesalahan kamu boleh dipenjara selama tempoh yang boleh sampai dua tahun, atau dengan denda, atau dengan kedua-duanya.

Issue Of Appeal

B **[2]** With the facts clarified, what is left is the legal issue at hand. The central crux and issue of this appeal is whether an order of discharge amounting to acquittal (DAA) should be given by the learned Sessions Court Judge based on the fact that the complainant had withdrew a police report and the case against the appellant. In other word, learned counsel for the
C appellant had submitted that in this circumstances the appellant should be discharged amounting to an acquittal (DAA) even though there was no indication by the respondent/prosecution of not being interested in pursuing the matter further.

Brief Fact

D **[3]** At p. 8 of the appeal record, the learned Sessions Court Judge had narrated the scenario of the proceeding. Having perused the notes of proceedings at pp. 26 till 33 of the appeal record, I concluded as such. On 11 March 2015, the appellant was charged with three charges as above. The three charges were first read to the appellant and being explained and the
E appellant had claimed trial for all the charges. On 11 May 2015, it revealed that there were some developments pertaining to the case between the appellant and the complainant and only then the DPP had on 2 June 2015, officially informed the court that the complainant had wanted to withdraw the report. The learned judge continued to hear the evidence of the
F complainant on oath. In short, the complainant did not intend to pursue with his complaint and the police report against the appellant. His main reason for changing his mind was due to the consideration being given to the children and family. He did not mention either it was for his children and family or the appellant's. Upon hearing the evidence of the complainant in short,
G learned counsel for the appellant did not pursue to cross-examine the complainant but instead applied an order for the learned Sessions Judge to discharge the appellant amounting to an acquittal (DAA). Nevertheless, learned DPP sought for the appellant to be discharged not amounting to acquittal (DNAA) under s. 254 of the Criminal Procedure Code.

H **The Counsel's And The Respondent's Submissions**

[4] The crux of learned counsel's arguments was that the appellant was a government police officer with the rank of Assistant Superintendent Police (ASP) and such order of discharge not amounting to an acquittal (DNAA) would definitely affect his future prospect in the police department.
I Furthermore, the complainant in this matter was no longer interested in pursuing with this matter. Learned counsel for the appellant had in his written submission at p. 9 submitted that without the presence or the

evidence of the complainant, it was impossible for the respondent to proceed with the trial *vis-à-vis* no evidence at all against the appellant. Counsel had referred to *Alamgir & Another vs. The State of Bihar* on 14 November 1968, equivalent citations: 1959 AIR 436, 1959 SCR Supl (1) 464.

[5] Learned DPP on the other hand had submitted that though the complainant was not interested to proceed with his complaint, nevertheless the most material witness lies on the victim/wife and some other evidence. The other evidence was yet to be heard before the court. Hence, seeking for an order of discharge not amounting to an acquittal (DNAA).

Decision Of The Sessions Court Judge

[6] The gist of the decision of the learned Sessions Court Judge are as follows:

(i) article 145(3) of the Federal Constitution states that it is the power of the Attorney General being a Public Prosecutor to have the power to institute, conduct or discontinue any proceeding for an offence other than proceedings before the Syariah Court, a Native Court or a Court Martial;

(ii) with respect to s. 376 of the Criminal Procedure Code, the Attorney General shall be the Public Prosecutor and shall have control and direction of all criminal prosecutions and proceedings under the Code; and

(iii) with reference to s. 254 of the Criminal Procedure Code, though the complainant wishes to withdraw the complaint, nevertheless the victim who was the main witness has yet to give evidence. As such, an appropriate order should be discharged not amounting to an acquittal (DNAA).

Finding And Decision

[7] Having read the notes of proceeding, the grounds of judgment of the learned Sessions Court Judge, the appeal record and the submission of both parties and the authorities cited therein, it is my considered view that this appeal should not be allowed and I affirm the decision of the learned Sessions Court Judge.

[8] Before going into the merit of the facts, it is best to state that the Federal Constitution which is the supreme law of this land, and of which, statutory law must yield to, is enshrined in art. 145(3) of the Federal Constitution and reproduced below:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a Native Court or a Court Martial.

[9] In *Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152, Lord Suffian LP had occasion to say when touching on this article at p. 158 para. A (right):

> In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does wish to institute or to go with any criminal proceedings which he has decided to discontinue.

[10] Having read the above provision, and together with s. 376 of the Criminal Procedure Code, the Attorney General being the Public Prosecutor shall have full control and direction of all criminal prosecutions and proceedings under the Code. The learned Sessions Judges who are partners in the machinery of justice are similarly clothed with the relevant power and authority for the purposes of carrying out her duties. For the conduct of criminal cases, the learned Sessions Judge observes the procedures laid down in the Criminal Procedure Code.

[11] I wish to state that in arriving at my findings, I have entirely agreed with learned respondent/Deputy Public Prosecutor in that it is settled law that the power of the prosecution will always lie with the Public Prosecutor. Though the complainant was not interested to pursue with the trial or proceeding, this court would not usurp the power of the Public Prosecutor and discharge the appellant amounting to an acquittal (DAA). Neither the complainant is vested such power, as the power to discontinue will always lie on the Public Prosecutor and none others. As such, I think it was absurd to think that the learned Sessions Judge could brush aside the constitutional powers of the Attorney General.

[12] Without going overboard, it is trite law that the provisions of the constitution hold sway over any other laws (see: *Datuk (Datu) Amir Kahar Tun Haji Mustapha v. Tun Mohd Said Keruak (Yang Di-Pertua Negeri Sabah) & Ors* [1994] 4 CLJ 656; [1994] 3 MLJ 737 where even constitutional conventions could not override the express provisions of the Sabah constitution). NS Bindra in *The Interpretation of Statutes* in no uncertain terms said:

> The Constitution is the very framework of the body policy: its life and soul; it is the fountain-head of all its authority, the main spring of all its strength and power. The Executive, the Legislature and the Judiciary are all its creation, and derive their sustenance from it … While the constitution is the direct mandate of the people themselves, the statute is an expression of the will of the Legislature only, though the Legislature is also the representative of the people. A Constitution is but a higher form of statutory law …
>
> A written Constitution is to interpreted and effect given to it as a paramount law to which all other laws must yield.

[13] Due to the possible overlapping and inter encroachments of the jurisdiction by the Judiciary and the prosecution and due to this misunderstanding leading to incursions into each other territory, two views have mushroomed, namely:

(a) unless there are good grounds to the contrary, the discharge of an accused person should amount to an acquittal (see: *PP v. Suppiah Pather*, Penang Criminal Revision No. 14 of 1951, *PP v. Mat Zain* [1948] MLJ Supp 142, *Tan Ah Chan v. Regina* [1955] 1 LNS 155; [1955] MLJ 218, *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948] MLJ Supp 105, *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43; [1992] 2 MLJ 632 (CLJ at p. 1797); (MLJ at p. 632) and

(b) the other being that the discharge should not amount to an acquittal if the complainant is not interested as informed by the Public Prosecutor so long as he is still interested in prosecuting the accused.

[14] As regards to (a) above, it is now established that an acquittal can only follow if the prosecution does not desire to pursue the matter further (see: *PP v. Syed Abdul Bahari Shahabuddin* [1975] 1 LNS 137; [1976] 1 MLJ 87, *Koh Teck Chai v. PP* [1967] 1 LNS 72; [1968] 1 MLJ 166, *Kuppusamy v. Public Prosecutor* (*infra*)). As for (b), the above statement seemed to be the current established law. Therefore, when the complainant is not interested, without the latter hinting that the charge is groundless or disinterested in pursuing the case further, the application should be allowed. In this scenario an order of discharge not amounting to an acquittal should be appropriate.

[15] In the case of *PP v. Zainuddin & Anor* [1986] 1 CLJ 468; [1986] CLJ Rep 232; [1986] 2 MLJ 100, the court stated that:

> The question which we have to answer here was whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all ...
>
> Until the decision of Mohamed Azmi J (as he then was) in *Public Prosecutor v. Mohamed Said* (1984) 1 MLJ 50 it was generally considered as settled law that the magistrate had no such powers. Murray-Aynsley J in *Kuppusamy v. Public Prosecutor* (1948) MLJ 25 held that the earlier stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J in *Public Prosecutor v. Goh Kee Chuan* (1967) 1 MLJ 174 and *Public Prosecutor v. Mahmud* (1974) 1 MLJ 85. This view was accepted by the Federal Court, whose judgment was delivered by Ong J in *Chuu Chee Peng v. Public Prosecutor* (1973) 2 MLJ 35 ...
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> In *Chu Chee Peng*'s case the court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could be material to the prosecution case and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence

of *autrefois acquit* should be subsequently recharged for the same offence. The court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal:

(1) When after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (section 173(f));

(2) When because the main prop of the prosecution case has prematurely collapsed and further proceeding would be an exercise in futility, the prosecution may in its discretion offer no further evidence (section 254)

Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution unable to proceed should only be a discharge not amounting to an acquittal.

[16] Having said this, to my mind, to pronounce an order of discharge amounting to an acquittal, or discharge not amounting to an acquittal which is not in accordance with the requirements of the law, would tantamount to an *ultra vires* the Constitution and the Code.

Current Case Scenario

[17] Under s. 254 of the Criminal Procedure Code, at any stage of the trial, before the delivery of any judgment, the Public Prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquitted. In other word, there is no necessity for the learned Sessions Judge to consider further as to the viability of the charge but merely to acquit and discharge the accused after being informed. Under this provision, such discharge shall not amount to an acquittal unless the court so directs. In other words, for him to be recorded to have been acquitted, it must be pursuant to the pro-active act of the learned Sessions Judge who must so specify the details. Notwithstanding this supposed room given to the learned Sessions Judge, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.

[18] Reverting to the present appeal, it is not disputed that the DPP had informed the court that the complainant wishes to withdraw his report. Never did learned DPP at any time had inform the court below that the prosecution was not interested in pursuing the case nor was there any evidence made available from the notes of proceeding to show that the charge was groundless. At p. 37 of the appeal record, the prosecution had several other witnesses and evidence to prove the element of offence under s. 498 of the Penal Code. Though the court has yet to scrutinise such evidence, to my mind this reflects their seriousness to proceed on with the trial, if any. Furthermore, the court has yet to hear all other evidence and witnesses before comes to the conclusion of the case.

[19] I am quite disagreeable with learned counsel for the appellant submission at p. 14 of their bundle of submission, point No. 14 and 15. The issue of whether the prosecution wanted to call the wife of the appellant to give evidence is nonetheless the power of the prosecution. It is unjustifiable to question such power and prerogatives. It is also nonetheless to ask the wife whether she has agreed to proceed on with the trial or otherwise as it is the sole power of the Public Prosecutor. It is also unjustifiable for learned counsel to submit that the evidence of the wife of the appellant is immaterial as her name was concluded and mentioned in the charges. Furthermore, both parties had agreed that whether the incident had actually took place or otherwise, the evidence of the wife and others could be possible. Before me, there is nothing to show that the appellant knew that the incident took place at the hotel except that in his complaint. As such, the requirement of hearing other evidence becomes necessary.

[20] Pursuing the law further, with the learned Sessions Judge being subservient to the superior constitutional power of the Attorney General with regard to its inability to discharge an accused person amounting to an acquittal, compounded by all the above discussed reasons, a legal issue worth considering is whether the learned Sessions Judge has the inherent power to do so. At the outset the answer is in the negative.

[21] To conclude on the matter at hand, there was no justification for the learned Sessions Judge to issue an order of discharge amounting to an acquittal, in the circumstances of the case when:

(a) there was no specific grounds or reasons or indication propounded by the prosecution that they are not pursuing the matter further;

(b) there was nothing to show that the charge was groundless;

(c) it is absurd to think that she could nonchalantly brush aside the constitutional powers of the Attorney General conferred under art. 145(3) of the Federal Constitution;

(d) she has not heard all the evidence of the prosecution; and

(e) there are other witnesses and evidence available at all times.

[22] In the upshot of the case, I hardly find any special reasons and valid grounds for the discharge and acquittal order. By virtue of the above reasons I had no hesitation to dismiss the appeal.